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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1990

GLENDA SMITH AND RAY MARTIN,

Cross-Petitioners,

v.

HOWARD BARTON, LARRY BARNES, JACK UGAKI AND BRIAN WARDLE,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER CROSS-PETITIONERS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 BASED UPON THE EVIDENCE PRESENTED IN THIS CASE ON MOTION FOR SUMMARY JUDGMENT AND AT THE BENCH TRIAL.

2. WHETHER CROSS-PETITIONERS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER THE FIRST AMENDMENT BASED UPON EVIDENCE PRESENTED IN THIS CASE ON MOTION FOR SUMMARY JUDGMENT AND AT THE BENCH TRIAL.

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The cross-petitioners, Glenda Smith and Ray Martin, respectfully pray that, if this Court should decide to grant the writ to resolve whether or not a right of jury trial may be granted to secure rights under § 504, that it should likewise grant this cross-petition for certiorari in the interest of (1) securing conformity with prior decisions of this Court; (2) providing direction on important questions of federal law which have not been but should be settled by this Court; (3) judicial efficiency and (4) fairness to the litigants. The cross-petition for a writ of certiorari is

directed to the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 19, 1990 as to which a rehearing *en banc* was denied December 19, 1990. The names of the parties in this proceeding were correctly stated in the petition for certiorari at ii.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 914 F.2d 1330 and is reprinted in the petition for certiorari at App. 1.

The memorandum decision of the magistrate for the United States District Court for the District of Idaho has not been reported but is reprinted in the petition for certiorari at App. 38.

JURISDICTION

Jurisdiction of this Court to consider this cross-petition for the writ of certiorari arises under 28 U.S.C. § 1254(1). The petition for the writ of certiorari was received by counsel on March 21, 1991. Cross-petitioners rely on Rule 19.5 of the United States Supreme Court in filing this cross-petition.

STATUTES INVOLVED

The First Amendment of the United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . .

§ 504 of the Rehabilitation Act of 1973, as codified, 29 U.S.C. § 794(a):

> *Promulgation of nondiscriminatory rules and regulations: copies to appropriate committees.* No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

34 C.F.R. Part 104:

> § 104.4 Discrimination prohibited.
>
> (a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of,

or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others . . .

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Subpart B – Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under

any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists . . .

(9) Any other term, condition, or privilege of employment.

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

STATEMENT OF THE CASE

Smith and Martin, totally blind supervisors at the Idaho Commission for the Blind, filed the complaint in this case on September 21, 1984, alleging that their removal as supervisors in an agency "restructuring" constituted a violation of § 504 of the Rehabilitation Act of 1973 and of their First Amendment rights. The District Court denied a preliminary injunction on October 16, 1984 and Smith and Martin filed a notice of appeal on October 22, 1984. The Ninth Circuit affirmed the denial of an interlocutory injunction by the District Judge on December 17, 1984. On December 19, 1984 at 4:10 p.m. Barton called Smith and Martin into his office and presented them with identical letters: "You are relieved of

your duties" and instructed to vacate the premises "no later than 5 p.m. on December 20, 1984."

Rather than seek further review in this Court on the barebones record made in a four-hour preliminary injunction hearing in the District Court, counsel elected to return to the District Court for discovery and trial and to pursue further appellate review, if necessary, on the basis of a much more complete record.

A timely demand for jury trial was made by Smith and Martin on their § 504 and constitutional claims. Following the denial of the request for a preliminary injunction, the remedy at law for damages sought by counsel appeared to be the one most likely to afford complete relief to Smith and Martin. During the pendency of the proceedings, Smith died and his wife was substituted in his stead. As a result of Smith's termination of employment, he lost wages in the amount of $20,305.72. 1 T. 20. In addition, Smith was no longer covered by the Idaho state employees programs for health (with final medical expenses of $6,741.22) or life insurance (with a stipulated value of $55,286.40 at Smith's death), 1 T. 19. Smith's widow and five children have suffered accordingly. Following his dismissal, Martin incurred substantial losses (including the loss of his home) prior to his employment by the Utah blindness agency.

The judgment for defendants by the United States Magistrate for the District Court of Idaho was filed September 12, 1988, following a five-day bench trial commencing January 4, 1988. Petition for Certiorari at App. 25. Findings of Fact and Conclusions of Law were filed by the Magistrate on August 1, 1988. Petition for Certiorari at App. 27. The Magistrate by Memorandum Opinion and order of December 31, 1987 set the § 504 claims of Smith

and Martin for hearing without a jury. *Id.* at App. 38. The Ninth Circuit reversed the Magistrate for holding that the constitutional claims of Smith and Martin were pre-empted by their § 504 claims and remanded for jury trial on the constitutional and § 504 claims. The Ninth Circuit declined to reach the claims of Smith and Martin that they were entitled to relief as a matter of law on their § 504 and First Amendment claims. The petition for certiorari was filed to determine whether the Ninth Circuit's award of jury trial in a § 504 case is proper. This cross-petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

The record in this case fairly bristles with uncontradicted evidence that requires a finding of discrimination in employment under § 504. The September 5, 1984 "restructuring" of the blindness agency to remove Smith and Martin from their supervisory positions had a disparate impact on the blind in that it removed the only blind persons holding supervisory positions in the state blindness agency from their positions. The disparate impact is all the greater in the context of the dismissal in February 1984 of the blind director of the state agency, a National Federation of the Blind member like Smith and Martin. Nowhere in this record can be found a plausible explanation to explain or rebut the compelling inference of discrimination implicit in the removal in 1984 of *all* blind persons and *all* N.F.B. members in the four supervisory positions at the Idaho blindness agency. *See* 34 C.F.R. §§ 104.11(a)(4); 104.11(b)(2); 104.11(b)(4); 104.13.

The invidious character of the "restructuring" is apparent. *See infra* at 18-19 (exclusion of Gardner, the blind chairman of the Idaho Commission for the Blind and an N.F.B. member, from unlawful, secret meetings of conspirators in January and February 1984).

The agency director, Barton, compromised the selection process by providing substantial assistance to the sighted candidate, Easterling, who was selected to fill the new supervisory position. 3 T. 49; P's T. Ex. 162; Barton 3 Dep. 128-31; Easterling Dep. 52-83, 87-88, 91-92. Barton selected and gave to Easterling a substantial number of books, articles and speeches on blindness to prepare Easterling for his oral interview before the Idaho Personnel Commission and advised Easterling to "contact Personnel" about Easterling's score on the civil service examination. 4 T. 10, 12-14; Easterling Dep. 52-91. No comparable assistance was provided by Barton in the selection process to the blind candidates, Smith and Martin. *See* 34 C.F.R. 104.11(a)(4) and (b)(2).

The record in this case contains uncontradicted evidence of disparate treatment of the blind at the Idaho blindness agency sufficient to establish that the "restructuring" was part of a larger pattern of employment discrimination in violation of § 504 at the Idaho blindness agency. It was clearly a violation of § 504 for the board at its individual meetings with employees in July 1984 to deny Smith and Martin permission to tape record their individual meetings with the board. Martin Dep. 127-35. Audiotaping is an important and commonly used blindness-accommodation technique and the denial was unprecedented. 2 T. 94, 112-113. Barnes tweaked the earlobes of blind members of the board as a form of greeting

but never tweaked sighted persons. 2 T. 123. Barton chastised Martin for not being able to follow him on carpeted floor. Martin Dep. 111. Barton declared that if he ever knew "of a blind person that could competently fill the directorship of this agency, [he] will step aside and let them do it." 3 T. 87-89; Martin Dep. 120. There was eavesdropping, Martin Dep. 120-28, 148, and surveillance on blind employees at the agency by mirror. 1 T. 69-70, 2 T. 68. Blind employees were not authorized to evaluate secretarial staff. 1 T. 98. Offices of sighted supervisors were carpeted and those of blind supervisors were not. 1 T. 70-71. Commission secretaries disdained reading for blind employees. 1 T. 77. The agency did not provide braille print machines to blind employees and agency communications were not generally made available to blind employees in braille. 1 T. 85-86, 100-02.

As a result of extensive discovery and a five-day bench trial, the Court has before it at this time as full and complete a record of the evidence on the § 504 claims as can be developed by the parties to this case. Smith and Martin in their brief and at oral argument in the Ninth Circuit insisted that they are entitled to judgment as a matter of law on their § 504 claims on the record in this case. The Ninth Circuit, however, declared that its order granting jury trial on the § 504 claims "obviates the need for us to reach the other issues on appeal." Petition for Certiorari at App. 19. Thus, the argument of Smith and Martin that they are entitled to relief as a matter of law on the § 504 claims, pressed on motion for summary judgment and following the bench trial at the district level and again in briefing and oral argument in the Ninth Circuit, was pretermitted by the Ninth Circuit's

ruling that there is a right of jury trial on the § 504 claims presented.

The interest of Smith and Martin in reaching as expeditiously as possible a favorable judgment in this case following their recent success in the Ninth Circuit appeared to lie in a return to the District Court for jury trial rather than a petition for certiorari asserting their right to relief under § 504 as a matter of law. However, the filing of the petition for certiorari, temporarily at least, short-circuits access of Smith and Martin to a jury trial and prompts this cross-petition for certiorari.

If this Court grants certiorari on whether or not a right of jury trial attaches to the § 504 claims in this case, it should also grant certiorari on whether or not Smith and Martin are entitled to relief as a matter of law on their § 504 claims. The Court cannot adequately consider the availability of jury trial under § 504 without thoroughly familiarizing itself with the character of the § 504 claims in this case. Thus, interests in judicial efficiency support consideration of whether relief under § 504 should be granted as a matter of law in this case contemporaneously with consideration of whether there is a right to jury trial under § 504.

Fairness to the litigants similarly would suggest that the Court resolve whether Smith and Martin are entitled to relief on their § 504 claims as a matter of law, if it elects to hear the § 504 jury trial issue. The alternative would be to remand the case following disposition of the jury trial issue for consideration of the claims that Smith and Martin are entitled to relief as a matter of law under § 504, subject to possible subsequent review in this Court. This would unnecessarily lengthen and render more costly a

lawsuit which has already taken far too much time to resolve on the merits. The viability of § 504 as a remedy is closely related to the dispatch with which claimants' rights can be finally resolved on the merits. If the Court elects to grant certiorari on the jury trial issue, this cross-petition should likewise be granted.

The cross-petition presents important questions of federal law under § 504 which have not been, but should be, settled by this Court. Supreme Court Rule 17.1(c) This Court has not yet had occasion to decide the extent to which disparate impact analysis may provide a means of establishing a § 504 claim and this case would provide an excellent means for the Court to provide direction to the lower courts on this important issue. Moreover, this Court has never heard a blindness employment discrimination case under § 504 based upon intentional discrimination for reasons of social bias. This case provides such a record and offers the Court an opportunity to establish the standards which apply to such cases for the guidance of the lower courts.

II.

Smith and Martin have now waited almost seven years to obtain a favorable judicial ruling on several substantial First Amendment claims supported as a matter of law by the evidence in this case. These First Amendment claims were argued before Judge McNichols at the preliminary injunction hearing and subsequently on an unsuccessful interlocutory appeal to the Ninth Circuit on the denial of the preliminary injunction. The First Amendment claims were argued and briefed in the bench trial before Magistrate Williams (after the death of

Judge McNichols) and in the Ninth Circuit on review from the final judgment of the Magistrate. The Magistrate dismissed the First Amendment claims of Smith and Martin out of hand, holding that the First Amendment rights of the blind had been pre-empted by the Rehabilitation Act. The Ninth Circuit on review of the final judgment reversed the Magistrate's holding that the First Amendment claims were pre-empted and ordered jury trial. Unfortunately, the Ninth Circuit concluded that its ruling pretermitted the need for ruling on whether or not Smith and Martin were entitled to relief on their First Amendment claims as a matter of law.

Following the Ninth Circuit ruling, Smith and Martin were confident that their claims would be received quite differently by a jury than they had been by the federal Magistrate. Smith and Martin therefore decided to return to the district court for trial rather than spend additional months or years in a problematical and costly effort to obtain Supreme Court review of their right to recover as a matter of law on First Amendment claims.

The petition for certiorari upsets the earlier, weighed judicial strategy of Smith and Martin and prompts this cross-petition for certiorari. If the Court elects to grant certiorari on the § 504 jury trial issue, it should likewise grant certiorari to resolve whether or not "this record establishes that Smith and Martin are entitled to relief as a matter of law on . . . their First Amendment . . . claims." Ninth Circuit Brief of Appellants at 46-47. The grant of certiorari would be consistent with this Court's long-standing position that "in cases raising First Amendment issues [the Supreme Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make

sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumer Union of the United States, Inc.*, 466 U.S. 485, 499 (1984).

The record in this case has been fully developed through extensive discovery and a five day bench trial. An examination of the whole record establishes with convincing clarity that the "restructuring" of the Idaho Commission to remove Smith and Martin from their supervisory positions was the result of a civil conspiracy among the defendants, in the words of Wardle published in a 1984 issue of *The Key*, to end the "disaster" of "political domination" of the Idaho Commission for the Blind by members of the National Federation of the Blind. *See* Ninth Circuit Excerpts of Record 103 *passim*. (hereafter E.R.) The "restructuring" was a preferred means of cross-respondents in their "fighting to regain control of the Commission for the Blind with [sic] the State of Idaho; to take it out of the crushing grasp of a militant national political organization." *Id.* at 103. *See also* Barton 3 Dep. 94. The organization to which reference was made was the National Federation of the Blind, of which Smith and Martin were members.

Wardle spoke "very candidly" of Smith and Martin in a "confidential interview" with Idaho state auditors. Prelim. Inj. T. 29-30. Conceding that he was "biased," Wardle stated that "Smith and Martin are such rabid supporters of the NFB and Walhof" that "[t]hose two changes in staff" must be made. E.R. 85-86. In this interview, Wardle also suggested that another employee of the Idaho Commission for the Blind who was an N.F.B. member "be gotten rid of." *id.* In a letter to Governor Evans of Idaho requesting appointment to the Idaho Commission for the

Blind, Wardle called for "restructuring . . . the agency." E.R. 105. On March 15, 1984, Wardle published a letter in Idaho's largest daily newspaper, prepared by Barton and him, objecting to the "eastern interference" of the N.F.B. E.R. 99. The letter charged that Smith and Martin owed their supervisory positions to "a display of favoritism for her [Walhof, the fired former director, an N.F.B. member] political allies among the staff that resulted in unearned merit raises and in promotions of incompetent people to supervisory positions." *Id. Accord* E.R. 93, Wardle 3 Dep. 74, 102-03. In the fall of 1983, Wardle and Barton had organized a group which they named the Independent Blind of Idaho the charter of which stated one of its "primary purposes [is] to oppose . . . the domination of the Idaho Commission by one consumer group, the NFB." Wardle 3 Dep. 97, 99-100. Ugaki declared his support for "that type of consumer group" and "felt comfortable" with its purpose. Ugaki 1 Dep. 39. Walhof was accused of "restructuring the Commission staff with members of the National Federation of the Blind." E.R. 93. The "restructuring" of September 5, 1984 under which the supervisory positions of Smith and Martin were abolished was the conspirators' final antidote to the alleged domination of the Idaho Commission for the Blind by members of the National Federation of the Blind. National Federation of the Blind members holding supervisory positions at the Idaho Commission for the Blind had been publicly targeted for removal by Wardle, Barton and their co-conspirators in a circular distributed in the legislature in support of Ugaki's confirmation as a member of the Commission board in January 1984:

> Those in administrative positions are all members of the National Federation of the Blind of Idaho:

a. *Chairman of Commission Board* – is N.F.B. President of Idaho Chapter and member of the National N.F.B., board

b. *Administrator* – N.F.B. – hired from N.F.B. headquarters in Baltimore, Md

c. *Deputy Administrator* – N.F.B. – wife is editor of N.F.B. publication

d. *Chief of Operation* – N.F.B. – Officer N.F.B.

e. *Chief of Field Services* – N.F.B. – Officer N.F.B.

E.R. 90. Wardle has admitted to calling for the dismissal of all supervisory staff at the Idaho Commission for the Blind who belonged to the National Federation of the Blind. Prelim. Inj. T. 79, Wardle 2 Dep. 29. Wardle met with Barnes to get the Commission Board to "correct the situation." Wardle 2 Dep. 18, 15-23; Barnes 1 Dep. 52-53, 55, 59-60, 80. Wardle and Ugaki discussed the alleged "NFB domination" of the Idaho Commission for the Blind and following those discussions, Wardle and Barton became active in Ugaki's confirmation battle. Wardle 1 Dep. 16-19, 24, 34, 47-52; Wardle 2 Dep. 19, 25-33; Wardle 3 Dep. 62, 67; E.R. 90, 92-93. An undated "Dear Legislator" letter, circulated in December 1983 by Wardle and others, stated:

> We the Independent Blind of Idaho will not support domination of any agency by any one consumer organization. The Independent Blind of Idaho is an *Idaho* organization founded because of our growing concern that one organization, the National Federation of the Blind whose vocational headquarters is in Baltimore, Maryland, was gaining complete dominance of the State agency.

E.R. 94-95. In a February 3, 1984 press release, in a reference to Smith and Martin, Wardle attacked the "restructuring of the Commission staff with members of the National Federation of the Blind." Wardle 1 Dep. 52-55 and Ex. 14 at par. 8. Wardle's animus to the N.F.B. sprang from what he characterized as an "attempt at the crucifixion of Brian Wardle" at the 1983 Idaho state N.F.B. convention. Wardle 3 Dep. 23, 29-37, 39, 41-42, 45-55, 78-86, 82-83, 98-99, 214-15. Wardle, Barnes and Ugaki discussed the alleged domination of the Idaho Commission for the Blind by members of the National Federation of the Blind on many occasions. Wardle 3 Dep. 155-56, 160, 167-72; Ugaki 1 Dep. 38-39; Ugaki 3 Dep. 44-45. At the open meeting of the Idaho Commission for the Blind on February 3, 1984 Wardle spoke against the "overbearing dominance by one consumer organization controlling this agency" and called for Walhof's dismissal to "depoliticize" the Commission. Plaintiff's Trial Exhibit 143 at 231, par. 2. On February 3, 1984, subsequent to the dismissal of the director and deputy director of the Idaho Commission for the Blind (both N.F.B. members), Wardle charged that Walhof's N.F.B. affiliation amounted to a "conflict of interest," although Wardle and Barton were active members in the I.B.I. when the "restructuring" of September 5, 1984 took place. Wardle 3 Dep. 157-58, 165; Barton 3 Dep. 294 and 3 T. 59. Wardle attacked the National Federation of the Blind as a "political organization" and declared that the National Federation of the Blind was "in charge" of the Idaho Commission for the Blind and that Commission decisions were "made in Baltimore." Wardle 3 Dep. 158-59 and Ex. 6. Wardle admitted that he lacked personal knowledge of the truth of such charges. *Id.* at 233-34.

From the fall of 1982 into the winter of 1984, Barton and Wardle conducted a successful campaign to persuade Barnes, Ugaki, Governor Evans and the Governor's staff that the National Federation of the Blind was "gaining complete dominance of the State agency." Barton 3 Dep. 108-09; Wardle 1 Dep. Ex.10 and 11; Wardle 2 Dep. 16, 25-26, 48; Governor Evans Dep. 6, 36-39; Barnes Dep. 46, 48, 52-53, 79; Ugaki 1 Dep. 39, 64; Jones Dep. 22; Peterson Dep. 22-43. Barton, like Wardle, was committed to getting rid of members of the National Federation of the Blind in supervisory positions at the Idaho Commission for the Blind. Barton 3 Dep. 107-110, 185 and E.R. 90 at par. 2. Barton was quoted widely (and accurately) in the press and media between February and July 1984 for the proposition that the National Federation of the Blind "controlled" the Idaho Commission for the Blind. Barton 3 Dep. 179. Barton looked on the tenure of Smith and Martin as proof of such N.F.B. "control," Barton 3 Dep. 180, 185, although Barton could recall of no instance in which the N.F.B. affiliation of Smith and Martin had interfered with their official duties. *Id.* 200-01.

The pace of the conspiracy quickened in January of 1984 when Barton, Barnes and Ugaki held secret meetings in violation of the state open meetings law to finalize their plan to get rid of members of the National Federation of the Blind holding supervisory positions at the Idaho Commission for the Blind. Memorandum Decision and Order of August 31, 1984 in Gardner Record at 301-02 (Relevant portions of the Gardner record from the Idaho state court were incorporated into the record in this case by order of the Magistrate), *Gardner v. Barnes*, 719 P.2d 1185 (Idaho 1986), *cert. denied* 479 U.S. 1007 (1986); Ugaki

1 Dep. 49-54; Parsley Dep. 14; Peterson Dep. 22-43; Barnes Dep. 62-63. Gardner, the blind chairman of the Idaho Commission for the Blind and a member of the National Federation of the Blind, was excluded from these secret, unlawful meetings because of his affiliation with the National Federation of the Blind. 2 T. 141, 143.

On February 3, 1984, Barton fired the deputy director of the Commission instanter because of his membership in the National Federation of the Blind and because of his comments in support of Walhof at the open meeting. Barton 3 Dep. 120-21. Smith and Martin also spoke in favor of Walhof at the open meeting. Plaintiff's Trial Exhibit 143 at 222 and 239. *See also* Barnes 2 Dep. 1, 35, 45-48, 65, 75-76. Barton was unable to fire Smith and Martin instanter because they, unlike Cheadle, were non-exempt, civil service employees. *Id.* 119-23, 186; 3 T. 73. The "restructuring" of September 5, 1984 was the means chosen by the conspirators to put the finishing touches to their concerted plans in the winter of 1984 to rid the Idaho Commission for the Blind of all members of the National Federation of the Blind in supervisory positions.

In rendering judgment for the conspirators, the Magistrate chose to disregard substantial evidence of stonewalling, coverup and perhaps perjury. *See* Ninth Circuit Brief of Appellants at 20-21. For example, Ugaki could "not recall" anything of the substance of his eighteen telephone conversations with Boyd (secretary to Walhof) in January and February of 1984, although fourteen of these calls were for 13 minutes or more and one call lasted 59 minutes. Ugaki 3 Dep. 49. The conspirators substantially understated the extent of their telephone

communications, until confronted with long distance telephone records obtained under subpoena from the telephone company and from the records of the Idaho Commission for the Blind.

At the very least, this Court should grant the writ for the limited purpose of reaffirming important rights of Smith and Martin to comment publicly on matters of public concern without fear of state reprisal, as secured by prior decisions of this Court. There is substantial reason to believe that the statements of Smith and Martin at the public meeting of February 3, 1984 were a contributing cause of the "restructuring" and dismissal of Smith and Martin. Barton 3 Dep. 119-23; 3 T. 73. Smith and Martin were directed in July of 1984 during their individual meetings with members of the Idaho Commission for the Blind to make no public statements which would reflect negatively on the agency. Wardle 3 Dep. 147, Prelim. Inj. T. 105-06, 118. *But see Connick v. Myers*, 461 U.S. 138, 145 (1983). The record also contains an admission by Barton at trial that the filing of a lawsuit would be sufficient grounds for not hiring an employee. 3 T. 118, 142. Engaging in a constitutionally protected activity such as filing a lawsuit, which Smith and Martin did, cannot give rise to a lawful dismissal or failure to hire. Barton also publicly stated that if the students at the Idaho Commission for the Blind did not stop marching around the state house grounds in support of Walhof, he was going to get rid of those students. Barton 3 Dep. 191-92. As citizens, Smith and Martin spoke in favor of Walhof at a public meeting on February 3, 1984; participated in some of the marches in support of Walhof; and publicly criticized Wardle's appointment to the board of the Idaho

Commission for the Blind in July 1984. State sanction for such protected activities would constitute a retaliatory dismissal and is inconsistent with the prior decisions of this Court. *See Edwards v. South Carolina,* 372 U.S. 229 (1963).

Counsel would urge that the Court grant the writ to review the shameful record of abuse of First Amendment rights of association and speech revealed in this record and to secure Smith and Martin against such abuse as a matter of federal constitutional law.

CONCLUSION

For the reasons advanced in this cross-petition, Smith and Martin would urge this Court, should it decide to give plenary consideration of the right to jury trial under § 504, likewise to grant the cross-petition for certiorari and to resolve whether or not Smith and Martin are entitled to relief as a matter of law under § 504 or the First Amendment.

Respectfully submitted,

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